

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TREVA A. CLARK</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 166,795
<b>STATE OF KANSAS</b>	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward dated August 8, 1995, came on for oral argument.

**APPEARANCES**

Claimant appeared by and through her attorney, Beth Regier Foerster of Topeka, Kansas. The respondent, its insurance carrier, and the Kansas Workers Compensation Fund appeared by and through their attorneys, Derenda J. Mitchell and Jeffrey W. Jones of Topeka, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

The issues as listed from the respondent's Application for Appeals Board Review and Docketing Statement are as follows:

"1. Whether the Administrative Law Judge erred in finding that claimant developed the occupational disease of contact dermatitis as a result of her exposure to 'various chemicals and solvents in her employment'?

"2. Whether the Administrative Law Judge erred in finding that an alleged 'incident' on December 26, 1991, 'resulted in both a worsening of her lung problems and the dermatitis to a point where claimant was unable to continue working' at Kansas State University, and/or in finding that '[c]laimant's skin condition improved with removal from the harmful work environment, as did briefly her lung symptoms'?

"3. Whether the Administrative Law Judge erred in concluding that it is 'highly unlikely that claimant could ever again be employed again at substantial and gainful employment', and in assessing permanent, total disability to claimant, due to her reaction, as a result of her COPD, to fumes and vapors present in the workplace, when he also found that claimant's COPD was 'due to cigarette smoking', that her COPD 'was neither aggravated nor accelerated by her exposure to chemical fumes at her employment', that there was not 'a special risk' of developing COPD connected with claimant's employment, and that claimant's COPD caused by cigarette smoking was 'an ordinary disease of life and condition to which the general public is or may be exposed to outside of [claimant's] particular employment', (i.e., that claimant's COPD was not an 'occupational disease' under the Kansas Workers Compensation Act)?

"4. Whether the Administrative Law Judge erred as a matter of law in applying K.S.A. 44-5a01(d) to this case when he had previously specifically found that claimant's COPD was not an occupational disease within the meaning of the Kansas Workers Compensation Act?

"5. Whether the Administrative Law Judge arbitrarily disregarded the substantial and competent testimony of respondent's vocational expert, Mr. Dreiling, that claimant could expect to earn \$5.00 - \$6.00 per hour in jobs presently existing and available in the area of Manhattan, Kansas, which jobs did not involve exposure to fumes, vapors, or dust, nor to any of the same chemicals claimant had used while employed at Kansas State University, and which jobs claimant had the mathematical and other mental abilities to perform based upon her education, training, and experience, as well as upon the 'unskilled' nature of such alternative employments?"

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began her employment as a housekeeper for Kansas State University in 1988. Her work involved using various cleaning solutions and required she work around fumes and dust on a regular basis. Prior to her employment at Kansas State University, claimant had been diagnosed as having Chronic Obstructive Pulmonary Disease, stemming from her long history of smoking cigarettes. Claimant had used an inhaler to assist in the treatment of her pulmonary problems before beginning work with respondent. While employed with respondent, claimant also used various solvents in her employment resulting in the development of contact dermatitis and skin lesions. Claimant alleged that her exposure to the various solvents and chemicals at work worsened her already serious condition of Chronic Obstructive Pulmonary Disease (COPD) as well as her dermatitis. Claimant has further alleged that an incident on December 26, 1991, resulted in a worsening of her lung problems and dermatitis problems to a point where she was unable to continue working with respondent. Respondent was unable to accommodate claimant subsequent to the incident of December 26, 1991, and claimant has been unemployed since January 1992.

Claimant's skin dermatitis did improve when she terminated her employment. However, her lung symptoms which improved briefly continued to worsen thereafter to the point where claimant is currently dependent on oxygen supplements.

The findings by the Administrative Law Judge are somewhat confusing. The Administrative Law Judge found that claimant's oxygen dependency and her COPD were neither aggravated nor accelerated by her exposure to any of the chemical fumes at her employment. The medical evidence supports the finding that claimant's work exposure resulted in at most a temporary exacerbation to her lungs only. The Administrative Law Judge also found that there was no persuasive evidence in the record that there was any type of special risk of COPD connected with claimant's employment or that the COPD resulted from a reasonable consequence of the employment risks. The Administrative Law Judge further acknowledged that claimant's COPD would be considered an ordinary disease of life and a condition to which the general public is or may be exposed to outside of their particular employment. The Administrative Law Judge found no persuasive evidence that claimant developed COPD as a result of her exposure to the fumes and chemicals at work. He also stated that there was no evidence that claimant would have an occupational disease caused by chemicals and fumes at work, nor any evidence as to the amount of disability which would be attributable to claimant's breathing of fumes and vapors at work absent the COPD which claimant already had. The Administrative Law Judge then went on to grant claimant permanent total disability based upon evidence that the cause of claimant's leaving work was the breathing of fumes at work and not her COPD. This finding is contradicted by the evidence in the record and the Appeals Board reverses the Award to claimant in this matter.

K.S.A. 44-5a01(b) defines occupational disease to include:

"... only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. 'Nature of the employment' shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there

is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupation diseases . . . ."

K.S.A. 5a01(d) provides:

"Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants."

As is always the case in workers compensation matters, it is claimant's burden to prove her entitlement to benefits under the Workers Compensation Act by a preponderance of the credible evidence. See K.S.A. 1991 Supp. 44-501 and K.S.A. 1991 Supp. 44-508(g). The medical evidence is somewhat contradictory but all of the doctors testifying in this matter agree that COPD was not originally caused by claimant's employment. It is clear claimant's COPD condition existed long before she began her employment with respondent. The question which must be considered is whether or not claimant's condition was aggravated by her employment, with any permanence resulting therefrom.

Dr. Robert N. Hill, claimant's treating physician, felt that claimant's exposure to the fumes during her employment did not act to exacerbate the underlying lung damage. At most it may have aggravated claimant's symptoms of lung problems. Dr. Hill went on to testify that claimant's medical course was entirely consistent with the expected progression of COPD and that claimant's exposures at work did not cause, or change, or alter the natural history of the claimant's disease process.

Dr. Steven C. Watkins, who also had the opportunity to treat claimant for a period of time, testified that the progressive nature of the claimant's COPD would, in time, require oxygen supplementation regardless of outside aggravations. Claimant had smoked from one to two packs of cigarettes per day for more than 32 years. Dr. Watkins had diagnosed possible symptoms of COPD as early as 1983 which he attributed to claimant's smoking. Dr.

Hill also testified that claimant's COPD was caused by her smoking and nothing else. He acknowledged that claimant's exposure to the chemicals at work would cause temporary increases in symptoms but such exposures would not cause, contribute to, nor aggravate claimant's underlying COPD or the progression of the disease.

In January 1992, Dr. Allen F. Kossoy replaced Dr. Hill as claimant's primary physician. Dr. Kossoy agreed with both Dr. Watkins and Dr. Hill that claimant's COPD had its origin in claimant's smoking. He felt that claimant's exposure to fumes and chemicals may have temporarily aggravated the symptoms but did not cause, contribute to, permanently aggravate, or accelerate the pulmonary disease. Even Dr. Kathleen Kreiss, claimant's expert, in her original report of November 3, 1993, felt that, while claimant's exposure to irritants such as bleach, ammonia, and solvents may have participated in increased symptomatology "this exacerbation of her underlying condition probably did not change the natural history of her underlying emphysema."

The fact that claimant was diagnosed with emphysema is significant. K.S.A. 1991 Supp. 44-5a01(b) states in part:

" . . . *Provided*, That compensation shall not be payable for pulmonary emphysema or other types of emphysema unless it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman, but only to the extent such condition was so contributed to and aggravated by the employment."

Only Dr. Kreiss testified to any occupational contribution to claimant's current COPD. She felt that 90 percent of the claimant's problem was attributable to the preexisting COPD with 10 percent attributable to chemical exposures at work. This medical testimony was contradicted by treating physician Dr. Hill, who felt that 100 percent of claimant's symptoms and disabilities were related to the ongoing COPD process.

The Appeals Board finds, based upon a preponderance of the credible evidence, that claimant has failed to prove her entitlement to benefits for an occupational disease arising out of and in the course of her employment with respondent. Claimant's COPD appears to result from her 32 years plus of smoking one to two packs of cigarettes per day. As such it is not compensable as an occupational disease under the Workers Compensation Act of the State of Kansas. The Appeals Board finds the Award of Administrative Law Judge James R. Ward granting claimant benefits resulting from her COPD should be, and is hereby, reversed.

With regard to claimant's contact dermatitis, Dr. Byron B. Alexander, a dermatologist, testified regarding claimant's ongoing condition. He examined claimant on two separate occasions and was of the opinion that he did not have sufficient information to conclude more

probably than not that claimant's dermatitis was caused by exposure to chemicals while claimant was working for respondent. He did say that it was possible claimant's contact dermatitis was exacerbated by exposure at work. Dr. Kossoy opined that claimant's contact dermatitis was the result of contact with chemicals at work but was unable to say so within a reasonable degree of medical probability because certain testing procedures were not done in order to specifically define the cause of claimant's ongoing dermatitis. Dr. Kossoy also testified that using the same chemicals at home, as claimant did in this case, would cause the same symptoms at home and at work and therefore he could not define the harm caused by the home contact and contact at the work place. It is significant that when claimant terminated her employment with respondent she also ceased using the chemicals at home. This makes it difficult to conclude that the clearing up of claimant's condition subsequent to her termination of employment was a result of her lack of exposure at work rather than her lack of exposure at home. However, there is sufficient medical evidence to find that claimant's contact dermatitis was aggravated at work. The medical evidence is insufficient to show any more than a temporary aggravation at best. Also, there is no evidence that the aggravation of claimant's contact dermatitis at work is permanent.

It would appear that claimant's inability to return to work stems from her COPD which the Appeals Board has found to be noncompensable. The Appeals Board finds the medical evidence sufficient to support a temporary aggravation of claimant's contact dermatitis only, with no permanence resulting therefrom. Therefore, claimant is denied any permanency as a result of her alleged occupational diseases suffered with respondent through her last day of employment in January 1992. Respondent, its insurance carrier, and the Kansas Workers Compensation Fund would however be responsible for any medical treatment associated with claimant's contact dermatitis while the temporary aggravation was symptomatic. Claimant would also be entitled to future medical care for the contact dermatitis should sufficient evidence be presented to show any future flare-ups stem from claimant's employment with respondent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that, with the exception of the medical treatment for contact dermatitis, the Award of Administrative Law Judge James R. Ward dated August 8, 1995, should be, and is hereby, reversed and an award of compensation is hereby denied claimant, Treva A. Clark, against the respondent, Kansas State University, Department of Housing, and its insurance carrier, State Self-Insurance Fund, and the Kansas Workers Compensation Fund for any disability resulting from claimant's COPD. Claimant is granted an award against respondent, its insurance carrier, and the Kansas Workers Compensation Fund for the medical treatment stemming from claimant's contact dermatitis which developed during claimant's employment with respondent. Claimant would be entitled future medical benefits to the extent that further contact dermatitis symptoms are shown to be the result of claimant's past employment with respondent.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 50 percent against the respondent and its insurance

carrier and 50 percent against the Kansas Workers Compensation Fund per the agreement of the parties.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS  
Jeffrey W. Jones, Topeka, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director